IN THE

# Supreme Court of the United States

October Term, 1978

Docket No. 78-1774

J. R. ADAMS, FIRST CITY NATIONAL BANK, AND OKC CORP.,
*Petitioners,*

— against —

UNITED STATES OF AMERICA AND REGIONAL COUNSEL,
Region Six, Department Of Energy,
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

## PETITION FOR A WRIT OF CERTIORARI

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United States of America and Regional Counsel,
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*Respondents.*

On Petition For a Writ of Certiorari
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of The United States

## PETITION FOR A WRIT OF CERTIORARI

*To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

Petitioners, in support of their Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States, respectfully show, as follows:

## OPINIONS BELOW

The orders sought to be reviewed were entered in the Temporary Emergency Court of Appeals of the United States ("TECA") on May 18, 1979, and are appended hereto as Appendix A. All other orders, judgments, and opinions entered in this action, both in the Temporary Emergency Court of Appeals and the United States District Court for the Western District of Texas, are appended collectively as Exhibit B. None is yet reported.

## GROUNDS FOR JURISDICTION

This Court has jurisdiction under Section 211(G) of the Economic Stabilization Act of 1970, as amended, and 15 U.S.C. § 754. The orders sought to be reviewed were entered on May 18, 1979. This Petition is filed within thirty days of the entry of the orders sought to be reviewed. A timely filed petition for rehearing on the underlying judgment was denied on April 27, 1979.

## QUESTION PRESENTED FOR REVIEW

Whether an unexecuted civil administrative subpoena can be enforced after a criminal reference by the issuing agency.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty or property, without due process of law . . . .

15 U.S.C. § 772(e) provides:

> (e)(1) The Administrator, or any of his duly authorized agents, shall have the power to require by subpena the attendance and testimony of witnesses, and the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence which the Administrator is authorized to obtain pursuant to this section.
>
> (2) Any appropriate United States district court may, in case of contumacy or refusal to obey a subpena



> issued pursuant to this section, issue an order requiring the party to whom such subpena is directed to appear before the Administration and to give testimony touching on the matter in question, or to produce any matter described in paragraph (1) of this subsection, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Section 645 of the Energy Organization Act, P.L. 95-91, August 4, 1977, provides:

> For the purposes of carrying out the provisions of this Act, the Secretary, or his duly authorized agent or agents, shall have the same powers and authorities as the FTC under §9 of the Federal Trade Commission Act [15 U.S.C. 49] with respect to all functions vested in, or transferred or delegated to, the Secretary or such agents by this Act.

10 C.F.R. § 205.8 provides, in part:

> (a) The Administrator of the FEA [*], his duly authorized agent, the FEA General Counsel, or the agency official designated to conduct a hearing or public hearing convened in accordance with Subpart M of this part may sign and issue subpoenas either on his initiative or, upon an adequate showing that the information sought will materially advance the proceeding, upon the request of any person participating in that proceeding.

## STATEMENT OF THE CASE

This case presents yet another facet of the complex problem created when a federal agency seeks simultaneously to conduct civil and criminal investigative proceedings.

Here, according to an affidavit on file in the TECA, the Department of Justice received a criminal referral from the Department of Energy ("DOE") in a matter styled

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*The Secretary of Energy under the Energy Organization Act, P.L. 95-91, assumed the powers previously delegated to the Administrator of the Federal Energy Administration ("FEA").

*J. R. Adams, et al.* which involved OKC Corp. That referral, according to the Justice Department, occurred on February 6, 1979.

At that time, two appeals were *sub judice* before TECA, which had as of then rendered no decision or judgment. Both appeals concerned orders issued by the United States District Court for the Western District of Texas, which enforced two civil administrative subpoenae issued by the Acting Regional Counsel of Region Six of the DOE to the First City National Bank of El Paso, Texas (erroneously identified by the DOE as "Southwest National Bank").* The civil subpoenae pertained to the DOE's *J. R. Adams, et al.* investigation.

Upon learning of the criminal reference, the TECA appellants (J. R. Adams, OKC Corp. and the bank) jointly moved before TECA to vacate the judgments and orders in the case upon the ground that the DOE's criminal reference precluded enforcement of the DOE's civil subpoenae. In support of their motion, the petitioners pointed to this Court's recent decision in *United States v. LaSalle National Bank*, —U.S.—, 57 L. Ed. 2d 221 (1978), in which this Court explicitly held that a civil administrative subpoena could not be enforced if it was employed after a criminal reference.

The philosophy for that rule was summed up in *LaSalle*, as follows:

> A referral to the Justice Department permits criminal litigation to proceed. The IRS cannot try its own prosecutions. Such authority is reserved to the Department of Justice and, more particularly, to the United States attorneys. 28 USC § 547(1) [28 USCS § 547(1)].

*The lawsuit commenced when the Department of Justice, on behalf of the United States and the DOE's Acting Regional Counsel, brought a subpoena enforcement action against the bank under 15 U.S.C. § 772 and 10 C.F.R. § 205.8(b)(i).



> Nothing in § 7602 or its legislative history suggests that Congress intended the summons authority to broaden the Justice Department's right of criminal litigation discovery or to infringe on the role of the grand jury as a principal tool of criminal accusation. *Accord, United States v. Morgan Guaranty Trust Co.*, — F.2d — (CA2 1978); *United States v. Weingarden*, 473 F.2d 454, 458-459 (CA6 1973); *United States v. O'Connor*, 118 F.Supp 248, 250-251 (Mass. 1953); *see Donaldson v. United States*, 400 U.S., at 536, 27 L.Ed. 2d 580, 91 S.Ct. 534; cf. *Abel v. United States*, 362 U.S. 217, 226, 4 L.Ed. 2d 668, 80 S.Ct. 683 (1960), 57 L.Ed. 2d at 233.

Obviously, the proscriptions against IRS subpoena enforcement are equally applicable to other Executive agencies, including the DOE.

As to interagency cooperation, such as that between DOE and the Justice Department's Criminal Division, *LaSalle* had further observed:

> But such cooperation, when combined with the inherently interwined nature of the criminal and civil elements of the case, suggests that it is unrealistic to attempt to build a partial information barrier between the two branches of the executive. Effective use of information to determine civil liability would inevitably result in criminal discovery. The prophylactic restraint on the use of the summons effectively safeguards the two policy interests while encouraging maximum interagency cooperation. *Id.*

Logically, under these standards, there is no difference between enforcement of a civil subpoena issued after a criminal reference, and post-reference enforcement of an earlier-issued civil subpoena.

The United States and the DOE took a different view. They argued that the *LaSalle* rule was purely technical and that the date of the subpoena's issuance controlled the

outcome in a mechanical fashion. The TECA concurred in a summary decision. (Appendix A) Thus, that issue is presented to this Court.

## REASONS FOR GRANTING THE WRIT

### 1. The Court Below Has Decided a Federal Question In A Way In Conflict With Decisions of This Court

The rule that a civil administrative subpoena cannot be employed so as to further a criminal investigation is well established. *LaSalle, supra,* has recently reconfirmed that fact. Where the Grand Jury starts, the civil processes of government stop.

This is not a new concept. In 1964, a unanimous Supreme Court stated in *Reisman v. Caplin,* 375 U.S. 440, 449 (1964):

> Furthermore, we hold that in any of these procedures before either the district judge or United States Commissioner, the witness may challenge the summons on any appropriate ground. This would include, as the circuits have held, the defenses that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution, *Boren v. Tucker,* 9 Cir. 239 F.2d 767, 772-773, as well as that it is protected by the attorney-client privilege, *Sale v. United States,* 8 Cir. 228 F.2d 682.

The statement in *Reisman* was again reviewed by the Supreme Court in *Donaldson v. United States,* 400 U.S. 517, 532 (1971), and was again reaffirmed.

In *Donaldson,* the IRS claimed that *Reisman* placed the government in the dilemna of having to choose between (a) subpoenaeing civilly a potential defendant's records and thereby surrendering any further criminal action or (b) commencing a criminal action immediately, even though a criminal case may ultimately be found not to lie. The



Supreme Court resolved the IRS's dilemna by holding that as long as the subpoenae were employed (i) in good faith, (ii) pursuant to congressionally authorized process, *and,* (iii) *prior to any recommendation to the Department of Justice* for prosecution, they were enforceable. 400 U.S. at 536.

Yet, the court below has deviated from this accepted law by a mechanistic construction of the language of the cases. Even though enforcement of the subpoenae would occur after the criminal reference, and even though such enforcement would effect the evils sought to be avoided by *LaSalle* and *Donaldson,* TECA would permit enforcement if the subpoenae were signed in advance of the reference. Such a decision conflicts with the principles enunciated by this Court.

### 2. The Decision Below Subverts the Protection Accorded By the Fifth Amendment

Under any system of government, there is always the difficult task of properly protecting the citizens from overreaching by the bureaucracy, while at the same time affording a mechanism for regulation and criminal prosecution. The primary institution selected to serve that purpose in the American federal system, from its inception, has been the Grand Jury. U.S. CONST., amend V.

One could, of course, trace the common law origins of that institution, starting from the Twelfth Century, or perhaps before, through its inclusion in the Magna Carta, James Madison's proposal of June 8, 1779 to require a grand jury indictment for all serious crimes, and an insertion to that effect in the Bill of Rights. Like most ancient institutions, it would over time have displayed a genesis based at least in part on political maneuvering, occasional stellar barriers to governmental impropriety, and regret-

table instances of prosecutorial subversion and circumvention.*

Be all that as it may, under our federal system it is the grand jury which "stands between the prosecutor and the accused". *Hale v. Henkel,* 201 U.S. 43, 59 (1906). "[T]he grand jury earned its place in the Bill of Rights by its shield, not its sword", *United States v. Cox,* 342 F.2d 167, 186 (5th Cir. 1965) (Wisdom, J., concurring); it is this institution "by which the subject was rendered secure against aggression from unfounded prosecutions of the Crown". *In re Charge to Grand Jury,* 30 F. Cas. 992, 993 (C.C.D. Cal. 1872) (No. 18,255). Without it, the executive branch of government might effectively "exile any man that was obnoxious to the government, by an instant declaration, that such is their will and pleasure". 4 W. BLACKSTONE, COMMENTARIES 349.

When approaching the question of parallel civil and criminal investigations in our federal system, the principle that the Grand Jury is specifically intended to serve both a protective and prosecutorial function must be kept in mind. It is a unique body. While various administrative entities (such as the DOE) may have some similar functions, they, ultimately, are not twins of the Grand Jury — they are prosecutors only, not protectors of the accused.

A decision to allow a simultaneous criminal and civil investigation of an accused is inherently likely to circumvent the Grand Jury's protective function. Beyond that, one might ask whether such circumvention would tend to have other socially unacceptable consequences.

Here, again, the answer is yes. First of all, there are fundamental differences between the federal concepts of civil investigation and criminal procedure. Indeed, Ameri-

*See generally, e.g.,* R. YOUNGER, THE PEOPLE'S PANEL (1963).



can criminal procedure has long been so restrictive as to the information supplied an accused that even the Soviets and the French objected to the use of American-like criminal methods at the Nuremberg trials. *See* Remarks of Justice R. H. Jackson, *quoted* at Bull, Nuremberg Trial, 7 F.R.D. 175, 178 (1945); *accord,* Orfield, *Discovery & Inspection in Federal Criminal Procedure,* 59 W. VA. L. REV. 221, 232-33 (1957).

Even with the advent of the Federal Rules of Criminal Procedure, and the amendments to them, discovery in civil matters is significantly broader than in criminal cases. *Accord, e.g., United States v. Ross.* 511 F.2d 757, 762 (5th Cir. 1975); *Clay v. United States,* 397 F.2d 901, 915 (5th Cir. 1968); *see United States v. Feinberg,* 502 F.2d 1180 (7th Cir. 1974), *cert. denied,* 420 U.S. 926 (1975). *See generally,* 8 R. CIPES, MOORE'S FEDERAL PRACTICE ¶16.02[1] (1978)* While displaying a tendency toward liberalization, our system has attempted on the whole to compensate for the denial to an accused of comprehensive criminal discovery by imposing elaborate, like restraints on the prosecution. *Accord, Wardius v. Oregon,* 412 U.S. 470 (1973); *compare, e.g.,* FED. R. CIV. P. 26 & 34 *with* FED. R. CRIM. P. 16 & 15. Yet, in the final analysis, it is the government which has the overall advantage. *See, e.g.,* Friendly, *The Fifth Amendment Tomorrow,* 37 U. CINN. L. REV. 671, 694 (1968).

Why, however, are these factors important? Because in an administrative inquiry which will with high probability result at most in civil litigation, there is some room to tolerate ill-defined, sweeping inquiries. Once the civil litiga-

*As to the underlying reason why governmental agencies truly resist criminal discovery, MOORE'S FEDERAL PRACTICE states: "Disclosure is not so much a matter of life and death, as it is a matter of exposure of officials to criticism". 8 *Id.* ¶16.02[1], at 16-43 (1978).

tion commences, the data gathered in the *ex parte,* administrative dragnet can be extracted by the defendant under FED. R. CIV. P. 26, after which he can prepare a defense to it.

The same is not true in a criminal case. Thus, deprived by administrative subpoena of even a Grand Jury to safeguard his interests, and faced with the attendant circumvention of the criminal discovery rules, a defendant could find himself confronted at trial by the selected fruits of an undisclosed and overbroad foray into his activities.

Second, there is the need for any system of justice to not only be fair, but also to be perceived as fair. No matter how scrupulous a government's representatives hold themselves out as being, the fact remains that actions which on their face appear unfair or one-sided necessarily erode the system of justice itself.

The important need to correctly balance these competing interests is highlighted by the history of administrative subpoenae themselves. When generalized agency subpoenae first appeared, they were kept within careful bounds by scrupulous judicial oversight. *ICC v. Brimson,* 154 U.S. 447, 478 (1894); *Harriman v. ICC,* 211 U.S. 407, 419 (1908); *FTC v. American Tobacco Co.,* 264 U.S. 298, 305-07 (1924); *Jones v. SEC,* 298 U.S. 1, 26 (1936). The subsequent judicial relaxation of that oversight resulted, for a time, in an all-encompassing regulatory environment laden with surprise inspections; the reaction to this development has been a re-assertion of judicial review. *See, e.g., Marshall v. Barlow's, Inc.,* 436 U.S. 307 (1978); *Michigan v. Tyler,* 436 U.S. 499 (1978). And, in the parallel civil-criminal context, the established rule that civil process could not be used to further criminal enforcement objectives was likewise reaffirmed. *United States v. LaSalle National Bank,* 57 L. Ed. 2d 221 (1978).



Clearly, over the years, courts have had to shape restraints upon the regulators so as to accord some protection to the citizenry. Indeed, in an even more attenuated situation involving multi-agency, civil-criminal investigations, one court, upon learning that one agency's administrative subpoena could, in part, aid the criminal enforcement activities of another, wrote in *United States v. O'Connor,* 118 F. Supp. 248, 250-51 (D. Mass. 1953):

> The Constitution of the United States, the statutes, the traditions of our law, the deep rooted preferences of our people speak clearly. They recognize the primary and nearly exclusive role of the Grand Jury as the agency of compulsory disclosure. That is the inquisitional body provided by our fundamental law to subpoena documents required in advance of a criminal trial, and in the preparation of an indictment or its particularization. See Hale v. Henkel. 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed. 652.
>
> To encourage the use of administrative subpoenas as a device for compulsory disclosure of testimony to be used in presentments of criminal cases would diminish one of the fundamental guarantees of liberty. Moreover, it would sanction perversion of a statutory power.

Consistent with this approach, the Court in *United States v. Henry,* 491 F.2d 702, 705 (6th Cir. 1974), held that ". . . where, as here, the information sought by the [IRS's] civil summons has an obvious and strong potential for supplying information needed in a pending federal criminal [narcotics conspiracy] case, we believe the use of the civil summons is as much an abuse of process as if a criminal tax case had been recommended or had actually been begun". Applying the rule of *Donaldson v. United States,* 400 U.S. 517, 536 (1971), the *Henry* court refused to enforce the civil summons.

The principles applied by these cases were reaffirmed last year by the Supreme Court in *LaSalle:*

> The likelihood that discovery would be broadened or the role of the grand jury infringed is substantial if post-referral use of the summons authority were permitted. . . . . Interagency cooperation on the calculation of the civil liability is then to be expected and probably encourages efficient settlement of the dispute. But such cooperation, when combined with the inherently intertwined nature of the criminal and civil elements of the case, suggests that it is unrealistic to attempt to build a partial information barrier between the two branches of the executive. Effective use of information to determine civil liability would inevitably result in criminal discovery. The prophylactic restraint on the use of the summons effectively safeguards the two policy interests while encouraging maximum interagency cooperation. 57 L. Ed. 2d at 233 (footnote omitted).

These principles, as a whole, clearly preclude enforcing a DOE subpoena covering the very OKC transactions now being reviewed by a grand jury, at the DOE's behest.

### 3. The Problems of Parallel Civil-Criminal Investigations Are Important and Recurring

Beyond the error of the court below, there are important reasons for reviewing its decision. In today's economic environment, with its attendant complex regulatory schemes, and the political pressures to investigate and, whenever possible, prosecute highly profitable business concerns, parallel civil-criminal investigations abound. As long as our economy continues as it has, this will remain true.

In such an environment, the judiciary must continually fashion and tighten the ground rules. *LaSalle* specifically confirmed one set — *i.e.,* at least if the issuance of a civil subpoena post-dates a reference, it cannot be enforced.



The government here, however, seeks to erode that doctrine with a ritualistic exception. Let the subpoena issue first, and refer the matter later but before enforcement, and an agency will reap the benefits of a two-pronged attack. Perhaps that was not the advance design here, but it most assuredly will be the effect of what was decided.

Accordingly, this Court should delineate the boundary clearly. Is the rule to be what common sense dictates — no data can be gathered by civil process after a reference — or is it to be something else?

## CONCLUSION

For all the foregoing reasons, a writ of certiorari should issue to the Temporary Emergency Court of Appeals of the United States as prayed.

May 25, 1979

Respectfully submitted,

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## APPENDIX "A"

## ORDERS SOUGHT TO BE REVIEWED

IN THE

# Temporary Emergency Court of Appeals of the United States

No. 5-33

UNITED STATES OF AMERICA and HAROLD CLEMENTS, II,
Acting Regional Counsel, Department of Energy
*Petitioners-Appellees,*

v.

FIRST CITY NATIONAL BANK OF EL PASO, TEXAS,
*Defendant-Appellant,*

J. R. ADAMS
*Intervenor-Appellant.*

Before Honorable Joe Ewing Estes, Honorable Frank M. Johnson, Jr., and Honorable Walter P. Gewin, Judges

**ORDER**

Having duly considered Appellants' Motion to Vacate Judgment entered by this Court on March 5, 1979, and the Appellees' opposition thereto, the Court concludes that such motion is completely without merit and should be denied. Accordingly, such motion is denied and stricken for attempted delay of subpoena enforcement.

IT IS SO ORDERED.

FOR THE COURT:

RUTH H. JACOBSON
Clerk

May 18, 1979



IN THE

# Temporary Emergency Court of Appeals of the United States

No. 5-35

UNITED STATES OF AMERICA and HAROLD CLEMENTS, II
Acting Regional Counsel, Department of Energy
*Petitioners-Appellees,*

v.

SOUTHWEST NATIONAL BANK,
*Defendant-Appellant,*

J. R. ADAMS
*Intervenor-Appellant,*

OKC, CORP.
*Applicant for Intervention-Appellant.*

Before Honorable Joe Ewing Estes, Honorable Frank M. Johnson, Jr., and Honorable Walter P. Gewin, Judges

**ORDER**

Having duly considered Appellants' Motion to Vacate Judgment entered by this Court on March 29, 1979, and the Appellees' opposition thereto, the Court concludes that such motion is completely without merit and should be denied. Accordingly, such motion is denied and stricken for attempted delay of subpoena enforcement.

IT IS SO ORDERED.

FOR THE COURT:

RUTH H. JACOBSON
Clerk

May 18, 1979

**APPENDIX "B"**

**OTHER ORDERS, JUDGMENTS AND OPINIONS IN THE CASE**



IN THE

# United States District Court

For the Western District of Texas
El Paso Division
No. EP-78-CA-129

UNITED STATES OF AMERICA, AND HAROLD CLEMENTS, II,
Acting Regional Counsel Department of Energy,
*Petitioners,*

v.

FIRST CITY NATIONAL BANK,
*Defendant,*

J. R. ADAMS,
*Intervenor.*

## ORDER

On the second day of November, 1978, the above-styled and numbered cause came on for consideration. After considering the record, evidence and testimony in this case, the Court is of the opinion that the Petition for Enforcement of the Federal Energy Administration subpoena should be partially granted, and accordingly,

IT IS HEREBY ORDERED that the Respondent, FIRST CITY NATIONAL BANK, shall comply fully with Paragraphs 1, 2, 4 and 5 of the subpoena, attached as Exhibit B to the Enforcement Petition on or before December 8, 1978.

IT IS FURTHER ORDERED that at the Respondent's election, the United States Federal Energy Administration shall provide the necessary personnel to photocopy any and all documents to be provided pursuant to the above-described subpoena, and said photocopying shall be made at the expense of Petitioners.

November 17, 1978

WILLIAM S. SESSIONS
United States District Judge

IN THE

# United States District Court

For the Western District of Texas
El Paso Division

No. EP-78-CA-129

UNITED STATES OF AMERICA, AND HAROLD CLEMENTS, II,
Acting Regional Counsel Department of Energy,
*Petitioners,*

v.

FIRST CITY NATIONAL BANK,
*Defendant,*

J. R. ADAMS,
*Intervenor.*

**ORDER**

On this date came on to be considered the Application of J. R. Adams to Intervene in the above-styled and numbered cause, and it appearing to the Court that said Application should be granted,

IT IS HEREBY ORDERED that leave is granted to J. R. Adams to intervene herein *pro hac vice.*

November 17, 1978

WILLIAM S. SESSIONS
United States District Judge



IN THE

# United States District Court

For the Western District of Texas
El Paso Division

No. EP-78-CA-129

UNITED STATES OF AMERICA and HAROLD CLEMENTS II,
Acting Regional Counsel, Department of Energy,
*Petitioners,*

v.

SOUTHWEST NATIONAL BANK,
*Defendant,*

J. R. ADAMS,
*Intervenor,*

OKC CORP.,
*Applicant for Intervention.*

**ORDER**

On this date came on to be considered the Motion of FIRST CITY NATIONAL BANK OF EL PASO (erroneously sued as SOUTHWEST NATIONAL BANK) for rehearing on United States Department of Energy's Motion to Compel Subpoena of Southwest National Bank. On December 8, 1978, Defendant, FIRST CITY NATIONAL BANK, filed its Notice of Appeal of this Court's Order of November 17, 1978 to the Temporary Emergency Court of Appeals, and accordingly, this Court is without jurisdiction since the cause is on appeal, and

IT IS THEREFORE ORDERED that Defendant, FIRST CITY NATIONAL BANK's, Motion for Rehearing be, and it is in all things, DENIED.

December 15, 1978

WILLIAM S. SESSIONS
United States District Judge

IN THE

# United States District Court

For the Western District of Texas
El Paso Division

No. EP-78-CA-129

UNITED STATES OF AMERICA and HAROLD CLEMENTS II,
Acting Regional Counsel, Department of Energy,
*Petitioners,*

v.

SOUTHWEST NATIONAL BANK,
*Defendant,*

J. R. ADAMS,
*Intervenor,*

OKC CORP.,
*Applicant for Intervention.*

## ORDER

On this date came on to be considered OKC CORP.'s Motion to Intervene as Defendant in the above-styled and numbered cause. On December 7, 1978, SOUTHWEST NATIONAL BANK (actually FIRST CITY NATIONAL BANK) filed its Notice of Appeal of this Court's Order of November 17, 1978 to the Temporary Emergency Court of Appeals. Accordingly, this Court is without jurisdiction at this time, since the cause is pending before the Temporary Emergency Court of Appeals, and

IT IS THEREFORE ORDERED that OKC CORP.'s Motion to Intervene as Defendant herein be, and it is in all things, DENIED.

December 15, 1978

WILLIAM S. SESSIONS
United States District Judge



IN THE

# United States District Court

For the Western District of Texas
El Paso Division

No. EP-78-CA-129

UNITED STATES OF AMERICA and HAROLD CLEMENTS II,
Acting Regional Counsel, Department of Energy,
*Petitioners,*

v.

SOUTHWEST NATIONAL BANK,
*Defendant,*

J. R. ADAMS,
*Intervenor,*

OKC CORP.,
*Applicant for Intervention.*

## ORDER

On this date came on to be considered the Motion of Intervenor, J. R. ADAMS, for Rehearing of the United States Department of Energy's Motion to Compel a Subpoena of certain records of First City National Bank (erroneously sued as Southwest National Bank). It appearing to the Court that the above-styled and numbered cause is presently on appeal before the Temporary Emergency Court of Appeals, and that therefore, this Court is without jurisdiction to consider said Motion for Rehearing,

IT IS HEREBY ORDERED that Intervenor's Motion for Rehearing be DENIED.

December 21, 1978

WILLIAM S. SESSIONS
United States District Judge

# Temporary Emergency Court of Appeals of the United States

No. 5-33

UNITED STATES OF AMERICA and HAROLD CLEMENTS, II, Acting Regional Counsel Department of Energy,
*Petitioners-Appellees*

v.

FIRST CITY NATIONAL BANK OF EL PASO, TEXAS,
*Defendant-Appellant*

J. R. ADAMS,
*Intervenor-Appellant*

Appeal from the United States District Court for the Western District of Texas, El Paso Division

(Civil No. EP-78-CA-129)

(Submitted: February 12, 1979 Decided: March 5, 1979)

TIMOTHY J. HERMAN, Rogers, Hughes & Herman, Austin, Texas, was on the brief for the Defendant-Appellant.

ELOISE E. DAVIES, Department of Justice, Washington, D. C., with whom Barbara Allen Babcock, Assistant Attorney General, and Jamie C. Boyd, U. S. Attorney, were on the brief for the Petitioners-Appellees.

Before ESTES, JOHNSON, and GEWIN, Judges.

PER CURIAM:

On the basis of a complaint filed by the Salt River Project,[1] the Federal Energy Administration (FEA), on March 31, 1975, began a civil investigation of J. R. Adams to de-

[1]Appellant's Brief (Apt.'s Br.) 7.



termine whether amounts Adams received for the sales of certain covered petroleum products were in compliance with applicable pricing regulations.[2] The investigation was assigned Category A status, indicating a high investigative priority and allowing the agency to combine three separate cases into one.[3] The FEA began negotiating with Kevin Hayes, an attorney representing J. R. Adams, for information concerning the investigation; and on November 15, 1977, Hayes tendered to the agency certain checks written by Adams.[4] From these checks, which had been deposited in the Southwest National Bank of El Paso (now First City National Bank of El Paso), the FEA obtained the names and account numbers of James Cardwell and Gilbert R. Russell.[5]

The Department of Energy (DOE) took the statement of J. R. Adams, the subject of the investigation in January, 1978.[6] On January 9, 1978, Cardwell and Russell testified before the DOE that they had received from Adams the checks which Hayes had tendered to the FEA in November, 1977,[7] and that these checks represented finder's fees "developed out of a profit margin that Mr. Adams charged."[8]

A subpoena duces tecum "[i]n a matter before the Department of Energy conerning J. R. Adams et al," was subse-

[2]Transcript (T.) 9, 10, 14. Unless otherwise noted, all references to the transcript are to testimony before the District Court of Harold R. Clements, II, deputy regional counsel for the Department of Energy (DOE), Region 6, Dallas, Texas.

[3]T. 9-10. Also under investigation were Consolidated Materials, Robert Vale, CLB, Stonewalker Corp., and OKC. T. 21-22.

[4]T. 10-11.

[5]T. 11.

[6]T. 41.

[7]T. 11.

[8]T. 44.

quently issued to the Southwest National Bank at El Paso, Texas, on March 8, 1978, requiring testimony and production of documents before the DOE on March 23, 1978, at Dallas, Texas. The Schedule of Documents Requested contained five paragraphs requesting records of various transactions of Cardwell and Russell:

1. Documents in your possession that contain records of transactions in the following numbered accounts —

   58-03-144
   13-11-336

   during the period December 1973 through December 1974.

2. Cashiers checks or Bank Money Orders purchased by either —

   James Cardwell or
   Gilbert R. Russell

   during the period December 1973 through December 1974.

3. Signature cards for all accounts maintained in your bank by James Cardwell or Gilbert R. Russell, individually or jointly, during the period December 1978 through December 1977.

4. Any Safe Deposit Box contract entered into with either James Cardwell or Gilbert R. Russell, or both of them, and in force during the period December 1973 through December 1977, or any portion of that time period.

5. Entry records for the Safe Deposit Boxes described in item 4 above and for the time periods in item 4.

On March 15, 1978, the Bank tendered, through its senior vice-president/cashier, Jim M. McVay, the ledger sheets for the accounts in question for the period December 1973-December 1974, as well as the requested signature cards.[9] How-

[9]T. 16, 23, 52. Apt.'s Br. 2. T. 52 contains testimony of Jim M. McVay, senior vice-president/cashier of the Bank.



ever, the Bank did not provide any of the remaining documents requested in the subpoena duces tecum.[10] DOE subsequently requested certain checks from the two accounts.[11] The Bank refused to comply with DOE's request in the absence of a separate subpoena for the checks.[12]

On July 12, 1978, the United States of America and Harold R. Clements, II filed a petition in the United States District Court for the Western District of Texas, El Paso Division, seeking to enforce the subpoena of March 8, 1978. An amended subpoena was issued to the Bank on October 6, 1978, returnable October 25, 1978. The amended subpoena sought the same documents and contained only very minor differences: the heading read, "In a matter before the Department of Energy concerning the DOE investigation of transactions in covered petroleum products by J. R. Adams and others, and the distribution of proceeds of the transactions," and the subpoenaed party was "First City National Bank, successor to Southwest National Bank." The Schedule of Documents Requested was identical to that attached to the original subpoena.

The District Court held an evidentiary hearing on November 2, 1978, in which counsel for J. R. Adams was allowed to participate as a defendant-intervenor. On November 17, 1978, the District Court entered an order enforcing all paragraphs of the subpoena except that requiring production of the signature cards.[13] The Appellant-Bank filed its notice of appeal to this court on December 8, 1978.

[10]T. 23.

[11].T. 49, testimony of Mr. McVay.

[12]Ibid.

[13]The signature cards were furnished at the same time as the ledger sheets. See n.9, supra.

The appellant, First City National Bank of El Paso (Bank), presents the following issues for review by this Court:

> 1. Is the subpoena issued by DOE requiring appellant First City National Bank to produce certain documents relating to James A. Cardwell and Gilbert R. Russell violative of the Bank's Fourth Amendment guarantees against unlawful search and seizure and did the District Court err in ordering compliance with Paragraphs 1, 2, 4 and 5 of said subpoena, particularly in the absence of an order of investigation or resolution setting forth the nature, purposes and scope of the agency's inquiry?
>
> 2. Assuming, *arguendo,* that the purpose and scope of the investigation deals with unlawful profit margins on sales of product by J. R. Adams, are the documents sought irrelevant and incompetent to any such inquiry?
>
> 3. Did the Appellant Bank, by virtue of its March 15, 1978 tender of documents, comply with Paragraph 1 of the "Schedule of Documents Requested" attached to the involved subpoena?
>
> 4. Did the issuance by DOE of an amended subpoena, seeking the same documents, supersede and render unenforceable the involved subpoena?[14]

The DOE, however, states the issue as follows:

> Whether the district court correctly ordered the First City National Bank to comply with the Department of Energy's subpoena.[15]

The Bank argues that the absence in the subpoena of an order of investigation or other standard by which relevance can be determined constitutes a violation of

[14]Apt.'s Br., 1-2.

[15]Appellee's Brief (Apl.'s Br.) 1.



the Fourth Amendment guarantee of freedom against unreasonable search and seizure; that documents from the accounts of Cardwell and Russell are incompetent and irrelevant with respect to amounts received by J. R. Adams from the sale of petroleum products; that its tender of all ledger sheets for the two accounts in question for the period December 1973-December 1974 satisfies paragraph 1 of the subpoena; and that the October 6, 1978 subpoena superseded the subpoena of March 8, 1978. The Bank requests that this court reverse the District Court's order enforcing the subpoena and render judgment in its favor, or alternatively, reform the District Court's order to delete enforcement of paragraph 1 of the subpoena.

The administrative subpoena involved in this case recites that it was issued by the DOE "under the authority of § 206 of the Economic Stabilization Act of 1970, as amended, incorporated by § 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, as amended; § 13 of the Federal Energy Administration Act of 1974; §§ 645 and 705 of the Department of Energy Organization Act and 10 CFR § 205.8 and § 205.201."

The DOE's subpoena authority under the Emergency Petroleum Allocation Act of 1973, as amended, 15 U.S.C. § 751 et seq. (EPAA), and the Federal Energy Administration Act of 1974, 15 U.S.C. § 761 et seq. (FEA Act), is discussed in detail in this Court's decision in *United States* v. *Empire Gas Corp.,* 547 F.2d 1147 (TECA 1976), and *United States* v. *Bell Oil Co.,* 564 F.2d 953 (TECA 1977).[16] Congress broadened this authority in § 645

[16] § 5(a)(1) of the EPAA, which incorporates § 206 of the Economic Stabilization Act of 1970, as amended. 12 U.S.C. § 1904

[Continued]

of the Department of Energy Organization Act, 42 U.S.C. § 7101 et seq. (DOE Act), by providing that:

> For the purpose of carrying out the provisions of this Act, the Secretary, or his duly authorized agent or agents, shall have the same powers and authorities as the Federal Trade Commission under § 9 of the Federal Trade Commission Act with respect to all functions vested in, or transferred or delegated to, the Secretary or such agents by this Act. . . .

Section 9 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. § 49, authorizes the FTC "to require by

[16] [Continued]

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note, authorizes [t]he head of an agency exercising authority under this title, or his duly authorized agent . . . for any purpose related to this title, to sign and issue subpoenas for the attendance and testimony of witnesses and the production of relevant books, papers, and other documents, and to administer oaths.

Section 13(b) of the FEA Act of 1974 requires

> [a]ll persons owning or operating facilities or business premises who are engaged in any phase of energy supply or major energy consumption [to] make available to the Administrator such information and periodic reports, records, documents, and other data, relating to the purposes of this chaper.

Section 93(e)( 1) of the same Act empowers

> [t]he Administrator, or any of his duly authorized agents . . . to require by subpoena the attendance and testimony of witnesses and the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence which the Administrator is authorized to obtain pursuant to this section.

The regulations promulgated pursuant to these statutes authorize the FEA (now DOE) to "initiate investigations relating to compliance by any person with any rule, regulation, or order promulgated by the FEA . . .," 10 CFR § 205.201 (a) and to "sign and issue subpoenas . . . upon an adequate showing that the information sought will materially advance the proceedings . . ." 10 CFR § 205.8(a).



subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation."

The Bank cites the fact that J. R. Adams, rather than Cardwell or Russell, is the target of DOE's investigation. However, decisions under § 9 of the FTC Act, which § 645 of DOE Act parallels, make it clear that "this section authorizes the Commissioner to subpoena documentary evidence from parties *not* the subject of an investigation or proceeding." *F.T.C.* v. *Cockrell,* 431 F. Supp. 561, 563 (D.D.C. 1977) (Emphasis in original); *F.T.C.* v. *Tuttle,* 244 F.2d 605 (2d Cir. 1957), cert. denied 354 U.S. 925, *F.T.C.* v. *Rockefeller,* 441 F.Supp. 234 (S.D.N.Y. 1977). Clearly then, the DOE was within its authority in issuing a subpoena to the Bank in order to obtain records from the accounts of Cardwell and Russell for use in the investigation of J. R. Adams.

This Court's decision in *United States* v. *Empire Gas,* supra, recognized as the legal standard applicable in subpoena enforcement proceedings the holding of *Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186, 209 (1945), that "[i]t is enough that the investigation be for a lawfully authorized purpose within the power of Congress to command." The DOE's investigation of Adams' profit margin from the sale of certain covered products has a lawfully authorized purpose under the EPAA, FEA Act, DOE Act, and applicable regulations.[17] The subpoena in question was issued under the same rules and regulations as the subpoenas enforced by this Court in *United States* v. *Empire Gas,* supra, and *United States* v. *Bell Oil Co.,* supra,

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[17] See, e.g., § 5(b), EPAA; §5, FEA Act; §§ 301(a), 641, 645, 705, DOE Act; and 10 CFR Part 205.

and shows on its face that it concerned a specific investigation by the DOE.

Referring to the permissible scope of agency inquiry, the Supreme Court in *Oklahoma Press Publishing Co.*, supra at 208, stated that "[t]he gist of the protection is in the requirement . . . that the disclosure sought shall not be unreasonable." Thus an otherwise lawful subpoena will be enforced if the requested information is reasonably relevant to the investigation. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1949). This standard of reasonable relevance does not, however, require a showing of specific need for the information. *F.T.C.* v. *Texaco, Inc.*, 555 F.2d 862 (D.C. Cir. 1977), cert. denied, 97 S.Ct. 2939, 2940.

From cancelled checks written by J. R. Adams, the target of the investigation, to Cardwell and Russell, the DOE learned of finder's fees paid by Adams on the basis of his profit margin. The DOE subsequently subpoenaed the Bank to produce records from the accounts of Cardwell and Russell "in a matter concerning J. R. Adams et al." The subpoena was issued for the lawfully authorized purpose of investigating profit margins from sales of covered products. The information requested related to the matter under investigation and was, therefore, relevant under *Oklahoma Press Publishing Co.*, supra; *F.T.C. v. Rockefeller,* supra. The statutes and regulations under which this subpoena was issued require no order of investigation or statement of purpose from which the relevance of the requested information can be determined. It is sufficient that relevance can be determined from the face of the subpoena. *United States* v. *Bell,* supra. The subpoena is not violative of any Fourth Amendment guarantees and is in all respects lawfully authorized and issued.

This Court's statement in *United States* v. *Bell Oil Co.*, supra, at 961, that



> [i]t is not for Bell to choose the records the FEA examines or to second-guess the FEA's decision with respect to whether it has obtained all information needed to meet its statutory mandate to determine compliance,

answers the Bank's contention that it complied with paragraph 1 of the subpoena by tendering all ledger sheets for the two accounts in question. At the evidentiary hearing, DOE Acting Regional Counsel, Harold Clements, II, testified that the ledger sheets reflected only deposits and withdrawals for the particular accounts.[18] Consequently, the only way for the DOE to learn more about certain transactions would be to receive copies of the checks. The District Court found such a request to be within the scope of paragraph 1 of the subpoena,[19] and such finding is not clearly erroneous. See *F.T.C.* v. *Texaco,* supra at 876 n. 29 (D.C. Cir. 1977).

The Bank's argument that the second subpoena, which merely made a correction to reflect the Bank's change of name, superseded the original subpoena has been properly characterized as hypertechnical.[20] In *United States* v. *Bell Oil Co.,* supra at 958, this Court stated that so long as the proper party is identifiable, a mistake in name is not fatal and that to hold otherwise would be to elevate "form over substance," citing *Conley v. Gibson,* 355 U.S. 41, 48 (1957). The Bank suffered no prejudice as a result of the mistake in name, and all other respects the second subpoena was identical to the first.

The Court's role in a subpoena enforcement proceeding is necessarily a limited one. Challenges other than those based on agency authority and relevance of requested information

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[18]T. 17-18.

[19]T. 72, finding of the District Court.

[20]Apl.'s Br. 20.

generally are not defenses in such a proceeding. The Supreme Court in *Endicott-Johnson* v. *Perkins*, 317 U.S. 501, 509 (1943) (footnote omitted), observed that the petitioner

> advanced many matters that are entitled to hearing and considered in its defense against the administrative complaint, but they are not of a kind that can be accepted as a defense against the subpoena.

See *F.T.C.* v. *Texaco*, supra at 879.

At the hearing in the District Court, a question arose as to the DOE's use in the Adams investigation of an allegedly illegally obtained "Report to Special Committee to OKC Corp. by Special Counsel." Appellant's contention in this regard affords no ground to deny enforcement of the subpoena issued to the Bank.

The Department of Energy subpoena, as amended, was issued for a lawfully authorized purpose, for determining compliance with DOE pricing regulations, seeks information relevant to that inquiry, and should be promptly enforced. The November 17, 1978 order of the District Court is AFFIRMED.



# Temporary Emergency Court of Appeals of the United States

No. 5-35

UNITED STATES OF AMERICA and HAROLD CLEMENTS, II, Acting Regional Counsel, Department of Energy,
*Petitioners-Appellees,*

v.

SOUTHWEST NATIONAL BANK,*
*Defendant-Appellant,*

J. R. ADAMS,
*Intervenor-Appellant,*

OKC CORP.
*Applicant for Intervention-Appellant.*

Appeal from the United States District Court
for the Western District of Texas, El Paso Division

(Civil No. E-78-CA-129)

(Submitted: March 15, 1979 Decided: March 29, 1979)

TIMOTHY J. HERMAN, Rogers, Hughes & Herman, Austin, Texas, Earl L. Yeakel, III, Kammerman, Yeakel & Overstreet, Austin, Texas, Arthur Mitchell, and G. Scott Damuth, OKC Corporations, Dallas, Texas, were on the brief for the Defendants-Appellants.

ELOISE E. DAVIES, Department of Justice, Washington, D.C., with whom Barbara Allen Babcock, Assistant Attorney General, and Jamie C. Boyd, U.S. Attorney, were on the brief for the Petitioners-Appellees.

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*The First City National Bank was erroneously sued as the Southwest National Bank.

Before ESTES, JOHNSON, and GEWIN, Judges.
Per curiam.

On January 4, 1979, a joint notice of appeal was filed by the First City National Bank of El Paso (Bank), J. R. Adams, and OKC Corp. (OKC). The Bank appeals from an order entered by the District Court on December 15, 1978, denying its motion for rehearing under F.R.Civ.P. (R.) 60(b); Adams appeals from an order entered by the District Court on December 21, 1978, denying its motion for rehearing under R. 60(b); and OKC appeals from an order entered by the District Court on December 15, 1978, denying its post-judgment motion to intervene under R. 24.[1]

Appellants state the issue in this appeal as

> whether the trial court erred in holding that it was without jurisdiction to consider motions, made pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, for relief from a final order.[2]

Appellants contend that new testimony, not available at the time of the November 2, 1978 subpoena enforcement proceeding in the District Court, contradicts statements by the government concerning the receipt and use of an allegedly privileged document, the "Report to Special Committee to OKC Corp. by Special Counsel" (OKC Report), and thus requires a new hearing under R. 60(b). This new evidence, according to Appellants, "surfaced"[3] in the December 11, 1978 deposition of David G. Ownby,

[1]The joint notice of appeal states that OKC appeals from the denial of a motion under R. 24 and R. 60; however, the record contains no motion by OKC under R. 60, and the District Court's order of December 15, 1978, refers only to OKC's motion under R. 24.

[2]Appellants' Statement Pursuant to Rule 15(c) of the General Rules of the Temporary Emergency Court of Appeals of the United States, 1.

[3]Appellants' Brief (Apts.' Br.), 7.



a former employee of OKC, taken in an Oklahoma state court action brought by OKC against Ownby. Appellants claim that "Clements' [the government witness] version and Ownby's version of what occurred were . . . markedly different."[4]

On January 12, 1979, the government (Appellee) moved for dismissal of this appeal on the grounds that the District Court's denial of the Bank's and Adams' motions for rehearing was not an abuse of discretion; that the District Court's denial of OKC's post-judgment motion to intervene was not an abuse of discretion; and that Appellants' allegations of a "tainted" DOE civil investigation cannot transform a subpoena enforcement proceeding into a trial.

In their reply of January 24, 1979 to the Appellee's Motion to Dismiss, the Appellants urge that the District Court should hear "all relevant evidence as to the taking of the report by the DOE . . .,"[5] that the District Court did in fact have jurisdiction to rule on the R. 60(b) motions, and that OKC is entitled to intervene under R. 24(a) or R. 24(b).

Appellants claim that the District Court "specifically left open Appellants' right to reapply for a rehearing based upon further evidence of governmental misconduct."[6] According to Appellants, this newly discovered evidence relates to

> [o]ne of the primary defenses asserted by the parties opposing the enforcement of the subpoena . . . that

[4]Affidavit of Arthur Mitchell, General Counsel for OKC Corp., 4.

[5]Appellants' Memorandum in Response to Appellee's Motion to Dismiss Appeal, 8.

[6]Apts.' Memorandum in Support of Motion for Summary Remand, 2. The statement in the Record, p. 78, on which Appellants rely in their brief, 3, does not, however, bear out this contention.

> the investigation by the DOE was based on a Special Report prepared by a Special Committee of the Board of Directors of OKC Corp. (R. 8, 9). [footnotes omitted]. This report was authored by a Dallas law firm and subject to the legal protection given to confidential communications between an attorney and his client. Subsequently, the Report was stolen from OKC and given to two federal agencies, one of which was the DOE.[7]

Appellants, however, take an unjustifiably broad view of a subpoena enforcement proceeding. The court's role in such a proceeding is limited to determining whether the subpoena was issued for a lawfully authorized purpose and whether it seeks information relevant to the agency's inquiry. If these questions are resolved in the affirmative, the subpoena is valid and must be enforced. *United States v. Empire Gas Corp.*, 547 F.2d 1147, 1151-52 (TECA 1976), *Endicott-Johnson Corp. v. Perkins*, 317 U.S. 501 (1943), *Oklahoma Press Publishing v. Walling*, 327 U.S. 186 (1946). Other matters which a defendant may be entitled to present in defense against an administrative complaint or in collateral actions are not proper defenses in a subpoena enforcement proceeding, *Endicott-Johnson, supra* at 509, and, if allowed, would unnecessarily frustrate the agency's investigative and, ultimately, compliance enforcement efforts. In *Hannah v. Larche*, 363 U.S. 420, 443-444 (1960), the Supreme Court observed that

> the investigative process could be completely disrupted if investigative hearings were transformed into trial-like proceedings. . . . Fact-finding agencies . . . would be diverted from their legitimate duties and would be plagued by the injection of collateral issues that would make the investigation interminable. . . . This type of proceeding would make a shambles of the investigation and stifle the agency in its gathering of facts.

[7] Apts.' Br., 3.



Appellants' argument that the DOE investigation is "tainted" by the use of the OKC Report, an allegedly privileged document, cannot be entertained as a defense against enforcement of the subpoena issued to the Bank. Issuance of a subpoena comes at an early stage of administrative action, as this Court recognized in *United States v. Empire Gas, supra* at 1152, n.3:

> This is only the commencement of administrative procedures which must be exhausted prior to agency determination of violations of the Mandatory Allocation and Price Regulations. *See City of New York v. New York Telephone Co.*, 468 F.2d 1401, 1402 (TECA 1972).

Section 211 of the Economic Stabilization Act, as amended, 12 U.S.C. § 1904 note (ESA), now incorporated in § 5 (a)(1) of the Emergency Petroleum Allocation Act of 1973, as amended, 15 U.S.C. §751 et seq. (EPAA), "was designed to provide speedy resolution of cases brought under the [ESA]." *Bray v. United States*, 423 U.S. 73, 74 (1975). The rehearing sought by Appellants would in no way be consistent with this purpose, but would instead cause undue delay in the enforcement of the subpoena already found valid in *United States, et al. v. First City National Bank of El Paso, Texas, et al.*, TECA No. 5-33, F.2d , decided March 5, 1979.

Furthermore, R. 60, under which Appellants seek rehearing, is a rule of equity which "attempts to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice should be done."[8] Appellants seek to use R. 60(b) as a vehicle for the presentation of evidence irrelevant to the sole issue before the District Court, that of the subpoena's validity. Ap-

[8] 11 Wright & Miller, Federal Practice and Procedure, § 2851.

pellants characterize certain statements made by David Ownby in connection with an Oklahoma state court action brought by OKC against Ownby as "new evidence." However, even if construed in the light most favorable to Appellants, this "new evidence" would not require the District Court to quash the subpoena. The District Court correctly found the issue of the use of the OKC Report, on which Appellants' R. 60(b) motions are based, to be remote to the question of the enforcement of the subpoena issued to the Bank for the records of two private depositors.[9] Clearly, then, Appellants have suffered no harm or prejudice as a result of the District Court's denial of these motions. No valid reason exists for remanding this proceeding to the District Court for presentation of this kind of "new evidence." "[T]he underlying public interest in such a vital source of energy for our day as oil." *Railroad Com. v. Rowan & Nichols Oil Co.*, 310 U.S. 573, 580, calls for prompt enforcement of the subpoena in question. All relief sought by Appellants is denied.

IT IS SO ORDERED.

[9]R. 78.



# Temporary Emergency Court of Appeals of the United States

No. 5-35

UNITED STATES OF AMERICA and
HAROLD CLEMENTS, II,
Acting Regional Counsel, Department of Energy,
*Petitioners-Appellees,*

v.

SOUTHWEST NATIONAL BANK,*
*Defendant-Appellant,*

J. R. ADAMS,
*Intervenor-Appellant,*

OKC CORP.,
*Applicant for Intervention-Appellant.*

BEFORE HONORABLE JOE EWING ESTES, HONORABLE FRANK M. JOHNSON, JR. and HONORABLE WALTER P. GEWIN, JUDGES.

Upon consideration of OKC Corporation's Petition for Rehearing and Suggestion for Rehearing En Banc, it is ORDERED that said Petition and Suggestion are hereby DENIED.

FOR THE COURT:

Ruth H. Jacobson
Clerk

April 27, 1979

*The First City National Bank was erroneously sued as the Southwest National Bank.

# Temporary Emergency Court of Appeals of the United States

No. 5-33

UNITED STATES OF AMERICA
AND HAROLD CLEMENTS, II,
Acting Regional Counsel, Department of Energy,
*Petitioners-Appellees,*

v.

FIRST CITY NATIONAL BANK
OF EL PASO, TEXAS,
*Defendant-Appellant,*

J. R. ADAMS,
*Intervenor-Appellant.*

BEFORE HONORABLE JOE EWING ESTES, HONORABLE FRANK M. JOHNSON, JR., and HONORABLE WALTER P. GEWIN, JUDGES.

This cause was submitted on the record on appeal from the United States District Court for the Western District of Texas, El Paso Division. In consideration whereof,

IT IS ORDERED that the November 17, 1978 order of the District Court is AFFIRMED.

FOR THE COURT:

Ruth H. Jacobson
Clerk

by:
Donna M. Bold
Chief Deputy Clerk

March 5, 1979

(District Court No. EP-78-CA-129)



# Temporary Emergency Court of Appeals of the United States

No. 5-35

UNITED STATES OF AMERICA
AND HAROLD CLEMENTS, II,
Acting Regional Counsel, Department of Energy,
*Petitioners-Appellees,*

v.

SOUTHWEST NATIONAL BANK,*
*Defendant-Appellant,*

J. R. ADAMS,
*Intervenor-Appellant.*

OKC CORP.,
*Applicant for Intervention-Appellant.*

BEFORE HONORABLE JOE EWING ESTES, HONORABLE FRANK M. JOHNSON, JR., and HONORABLE WALTER P. GEWIN, JUDGES.

This cause was submitted on the record on appeal from the United States District Court for the Western District of Texas, El Paso Division. In consideration whereof,

IT IS ORDERED that all relief sought by Appellants is DENIED.

FOR THE COURT:
Ruth H. Jacobson
Clerk

by:
Donna M. Bold
Chief Deputy Clerk

March 29, 1979

*The First City National Bank was erroneously sued as the Southwest National Bank.

**CERTIFICATE OF SERVICE**

The undersigned, a member of the Bar of the Supreme Court of the United States, does hereby certify that three copies of the foregoing Petition were this day served upon the respondents by depositing the same, enclosed in a first class air mail postage prepaid wrapper, addressed to the Solicitor General, Department of Justice, Washington, D.C. 20530, in a United States Post Office mail box. I further certify that all parties required to be served have been served.

May 25, 1979